(24)

FILED
MAY 13 1943
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 944

MERLIN F. RAINES,
Petitioner-Plaintiff,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

HERMAN D. RINGLE,
Counsel for Respondent.

CHARLES A. MALLOY,
Chief Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

INDEX.

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
POINT I. The classification prescribed by Section 19 (g) of the Unemployment Compensation Law of New Jersey is not arbitrary and unreasonable	3
POINT II. Section 19 (g) promotes fair competitive conditions and prevents evasion of the statute	6
POINT III. The petitioner cannot challenge Section 19 (g) of the statute in behalf of his contractors or subcontractors	7
POINT IV. Penalties were properly assessed against petitioner	8
CONCLUSION	9
APPENDIX	11

CITATIONS.

	PAGE
Alabama Power Co. v. *Ickes* (1937), 302 U. S. 464...	8
Avent v. *Mississippi Unemployment Compensation Commission, et al.* (1942), 316 U. S. 641.....	4
Bourjois v. *Chapman* (1937), 301 U. S. 183.....	8
Carmichael v. *Southern Coal & Coke Co.* (1936), 301 U. S. 495.....	3, 6
Charles C. Steward Machine Co. v. *Davis* (1936), 301 U. S. 548	3
Chicago, M. & St. P. R. Co. v. *Minneapolis C. & C. Asso.* (1917), 247 U. S. 490.....	4
Euclid v. *Ambler Realty Co.* (1926), 272 U. S. 365...	7
Fox v. *Standard Oil Co.* (1934), 294 U. S. 87.....	4
Great Atlantic & Pacific Tea Co. v. *Grosjean* (1937), 301 U. S. 412	4, 6
H. E. Butt Grocery Co. v. *Sheppard* (1939), 309 U. S. 331	4
Massachusetts v. *Mellon* (1922), 262 U. S. 474, 488..	7
Natural Gas Pipeline Co. v. *Slattery* (1937), 302 U. S. 300	4
Purity Extract & Tonic Co. v. *Lynch* (1912), 226 U. S. 192	7
Rochester Telephone Corp. v. *United States* (1938), 307 U. S. 125	4
Sexton v. *Newark District Tel. Co.* (Court of Errors and Appeals, 1913), 84 N. J. L. 85, aff'd 86 N. J. L. 701	8
State Board, Etc. of Indiana v. *Jackson* (1931), 283 U. S. 527	4

PAGE

United States v. *Lehigh Valley R. Co.* (1910), 220 U. S. 257 4

United States v. *Whyel* (1927), 19 F. (2d) 260, affd. (1928, on other grounds) 28 F. (2d) 30, certiorari denied (1929) 278 U. S. 664..... 4

NEW JERSEY STATUTES.

N. J. R. S. 43:21-14 (a) 8
N. J. R. S. 43:21-19 (g) 2, 4
N. J. R. S. 43:21-19 (h) (1) 5
N. J. R. S. 43:21-19 (h) (4)..... 4

FEDERAL STATUTE.

42 U. S. C. Chap. 7, sec. 1101 (Title IX of the Social Security Act) 3

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

MERLIN F. RAINES,
Petitioner-Plaintiff,
vs.
UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Statement of the Case.

The petitioner, Merlin F. Raines, is in the business of a contractor and builder, constructing dwelling houses and other buildings under contracts with landowners in the County of Camden and surrounding counties in New Jersey, and has been so engaged since the year 1938 (R. 1, l. 27; 28, l. 17). During the year of 1940 he had in his direct employ eight and nine individuals for some portion of a day in each of fourteen different weeks, seven individuals in his direct employ for some portion of a day in each of sixteen different weeks, and that during the other weeks of the year he had fewer than seven individuals in his direct employ (R. 37).

The petitioner regularly engaged, during the year 1940, subcontractors who were not "employers" subject to the provisions of the Unemployment Compensation Law of New Jersey. The subcontractors employed one to thirteen individuals for some portion of a day in each of the different weeks of the year 1940 to perform services under the contracts entered into with the petitioner (R. 37).

Under the provisions of Section 19 (g) (N. J. R. S. 43: 21-19 (g)) of the Unemployment Compensation Law of New Jersey, the petitioner became an "employer" subject to the Law on July 14, 1940, as this was the twentieth week in which the petitioner had in "employment" eight or more individuals for some portion of a day in each of twenty different weeks.

The petitioner does not dispute the application of the facts to his situation under the provisions of Section 19 (g) of the Unemployment Compensation Law of New Jersey, but contends that Section 19 (g) of the Law is unconstitutional.

Summary of Argument.

The provision of the Unemployment Compensation Law of New Jersey (N. J. R. S. 43:21-19 (g)) (Appendix) which is challenged by the petitioner does not create an arbitrary and unreasonable classification; the classification applies alike to all persons within its purview and no persons are omitted who have any characteristics of those included. Not only does the classification rest on sound constitutional grounds but avoids evasion of the statute and promotes fair competitive conditions.

The petitioner is not injured by the provision of the statute, above mentioned, and cannot be heard to complain in behalf of others who may be, supposedly, injured.

No substantial question appears to be involved for this Honorable Court's consideration.

ARGUMENT.

POINT I.

The classification prescribed by Section 19 (g) of the Unemployment Compensation Law of New Jersey is not arbitrary and unreasonable.

The classification prescribed by Section 19 (g) of the State Law is consonant with and follows the statute's basic principle of classification. The classification of employers of eight or more individuals, during a prescribed period of time, for the purpose of coverage and taxation under an unemployment compensation law, similar to the one in effect in New Jersey has been constitutionally approved by this Honorable Court in *Carmichael* v. *Southern Coal & Coke Co.* (1936), 301 U. S. 495; and a similar classification in Title IX of the Social Security Act (42 U. S. C. Chap. 7, § 1101) was approved in *Charles C. Steward Machine Co.* v. *Davis* (1936), 301 U. S. 548.

An unemployment compensation law may, consistent with its basic aim and purpose, prescribe a classification which determines the status of an employing unit by including in its employment experience the employment experience of other employing units. Such a provision, which has been judicially approved, is found in subsection 19 (h)

(4) of the New Jersey Law (N. J. R. S. 43:21-19 (h) (4)) (Appendix). This subsection is directly related to subsection 19 (h) (1) which classifies employers of eight or more individuals. That this subsection does not violate the provisions of the Fourteenth Amendment has been declared by this Honorable Court in *Avent* v. *Mississippi Unemployment Compensation Commission, et al.* (1942), 316 U. S. 641.

Similarly, a consideration of separate employing units, owned or controlled by the same interests, for the purpose of establishing a taxable class has been constitutionally sustained in other tax statutes. *United States* v. *Lehigh Valley R. Co.* (1910), 220 U. S. 257; *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Asso.* (1917), 247 U. S. 490; *United States* v. *Whyel* (1927), 19 F. (2d) 260, affd. (1928, on other grounds) 28 F. (2d) 30, Certiorari denied (1929) 278 U. S. 664; *State Board Etc. of Indiana* v. *Jackson* (1931), 283 U. S. 527; *Fox* v. *Standard Oil Co.* (1934), 294 U. S. 87; *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937), 301 U. S. 412; *Natural Gas Pipeline Co.* v. *Slattery* (1937), 302 U. S. 300; *Rochester Telephone Corp.* v. *United States* (1938), 307 U. S. 125; *H. E. Butt Grocery Co.* v. *Sheppard* (1939), 309 U. S. 331.

The provision in issue, herein, refers to an employment relationship more direct than that considered in the aforementioned cases. It provides:

> N. J. R. S. 43:21-19 (g). "* * * Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an em-

ployer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment; except that each such contractor or subcontractor who is an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, may recover the same from such contractor or subcontractor. * * *". (Printed in full in Appendix.)

We observe that only individuals performing services which are part of the petitioner's usual business are considered; a prescription which is consonant with the statute's basic principle of classification; viz., the requirement of eight or more individuals performing services for the petitioner in the *usual course of his business* as provided for in subsection N. J. R. S. 43:21-19 (h) (1) (Appendix).

The inheritance tax cases cited by the petitioner (Brief 8-9) do not involve a classification similar to that in the instant case. In the inheritance tax cases the irrebuttable presumption was tantamount to a rule of substantive law and when construed as such, created a result or classification that was arbitrary and unreasonable and which had no rational relation to the objects of the legislation; a legisla-

tive attempt to prevent evasion will not of itself render valid an otherwise arbitrary classification. Similarly, statutes that create an unreasonable presumption of guilt of a criminal offense are not analogous to the provision of the statute involved herein.

POINT II.

Section 19 (g) promotes fair competitive conditions and prevents evasion of the statute.

This Honorable Court in the case of *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1936), 301 U. S. 412, upheld the constitutionality of a state statute which imposed an "occupation tax" upon chain stores; in holding that the prescribed classification was not arbitrary and unreasonable as it prevented unfair competitive conditions, this Court at page 426, says:

> "Taxation may be made the implement of the exercise of the State's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful."

See also:

Carmichael v. *Southern Coal & Coke Co., supra.*

That the petitioner is an innocent party not intending to evade the law is not material, as the classification is otherwise reasonable. The statutory provision does not differentiate between situations involving actual fraud and those involving good faith. The innocent cannot complain, as the classification applies alike to all persons within its

purview, and reasonable ground exists for making a distinction between those who fall within the class and those who do not. *Cf. Purity Extract & Tonic Co.* v. *Lynch* (1912), 226 U. S. 192; *Euclid* v. *Ambler Realty Co.*, (1926), 272 U. S. 365.

POINT III.

The petitioner cannot challenge Section 19 (g) of the statute in behalf of his contractors or subcontractors.

We respectfully submit that the hereinbefore quoted provision of the statute which permits the petitioner to reimburse himself for all contributions paid with respect to the employees of his contractors or subcontractors from all moneys due to said contractors or subcontractors or, in any event, to recover the same from said contractors or subcontractors in an action at law, does not harm the petitioner. This is a right and privilege conferred upon the petitioner which does not injure him but, in fact, helps him. The petitioner contends that the provision injures his contractors or subcontractors; however, we respectfully submit, the petitioner must show that his constitutional rights are impaired and cannot rely upon supposititious situations or fanciful illustrations to show that as against him a statute is unconstitutional.

The validity of an act of the legislature cannot be challenged by a person who is not directly injured by the particular feature of the legislative act complained of. As stated by the Court in the case of *Massachusetts* v. *Mellon* (1922), 262 U. S. 474, 488:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which would otherwise stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement; and not merely that he suffers in some indefinite way in common with people generally. * * *"

Similarly:

> *Sexton* v. *Newark District Tel. Co.* (Court of Errors and Appeals, 1913), 84 N. J. L. 85, aff'd 86 N. J. L. 701;
> *Bourjois* v. *Chapman* (1937), 301 U. S. 183.

See also:

> *Alabama Power Co.* v. *Ickes* (1937), 302 U. S. 464.

POINT IV.

Penalties were properly assessed against petitioner.

Penalties under the statute are assessed for the failure to file the required tax returns (N. J. R. S. 43:21-14(a)). The petitioner knew of the statute and its application to his situation; in fact, he had originally deducted "workers'

contributions'' which were never remitted to the respondent (R. 33, l. 23). The petitioner could have filed his tax returns ''under protest'' and avoided the assessment of penalties; this he chose not to do.

The difficulty of securing information to file proper reports, as complained of by the petitioner, does not appear from the record (R. 33, 37-38). We further direct attention to the fact that out of 30,548 active and inactive employers who reported to the respondent prior to January 1, 1942, more than 1,000 have reported wages paid to employees of contractors and sub-contractors under the provisions of section 19(g). At the present moment, approximately 400 employers are reporting the wages paid to employees of their contractors and sub-contractors. The practical difficulty of making such reports and paying the taxes does not appear to be insuperable.

Conclusion.

The provision of the Unemployment Compensation Law of New Jersey which is constitutionally challenged by the petitioner is indispensable to the equitable and effective administration of the Law. Without it, thousands of workers in the State of New Jersey would have been and will be denied the benefits of the Law.

We respectfully submit that the provision not only avoids evasion of the Law and prevents unfair competitive conditions, but avoids an unreasonable discrimination which would otherwise obtain. It avoids the undesirable and unfair situation where an employing unit may avoid the attachment of subject status under the Law and the

coverage of workers by carrying on his usual business through contractors and subcontractors. It creates a just and reasonable classification which applies to all within its purview and which has a direct and reasonable relation to the objects and purpose of the legislation.

We respectfully submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

HERMAN D. RINGLE,
Counsel for Respondent.

CHARLES A. MALLOY,
Chief Counsel.